Supreme Court, U.S.
FILED
MAY 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1531

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

EARLE A. PARTINGTON, PETITIONER

v.

JOSEPH M. GEDAN and HOWARD T. CHANG, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO STRIKE SUGGESTION OF MOOTNESS MADE IN RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI; EXHIBITS A AND B

PARTINGTON AND FOLEY
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PETITIONER PRO SE

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MOTION TO STRIKE SUGGESTION OF MOOTNESS MADE
IN RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Petitioner Earle A. Partington, pro se, moves this Honorable Court pursuant to Rules 21 and 24.6 of the Rules of the Supreme Court of the United States to strike (1) the suggestion of mootness presented at pages ii, 17, 18 and 24-25 of Respondents' Brief in Opposition to the Petition for Writ of Certiorari filed April 26, 1990, and (2) Appendix J to the brief (pp. 55a-59a), because the case is not in fact moot.

Respondents' suggestion of mootness is based on Appendix J, which purports to be a waiver of the attorney-client privilege executed on April 20, 1990, by Petitioner's former client Clarke. Respondents argue that this purported waiver renders moot some if not all of the constitutional issues raised by Petitioner in his

Application for Writ of Certiorari. However, the validity of the purported waiver is presently in controversy and will continue to be litigated in the state courts. Respondents have not carried their heavy burden of proving waiver (Michigan v. Jackson, 475 U.S. 625, 633 (1986)) and their argument that the purported waiver renders this case moot is at best premature.

Serious ethical questions have been raised regarding the circumstances under which the purported waiver was obtained by Mark J. Bennett (successor to Howard T. Chang whom Respondents have argued "ought to be substituted as a party under this Court's Rule 35.3", brief at iii). These questions and challenges to the purported waiver had been raised and were known to Respondents by April 25, 1990, prior to the filing (but after the printing) of Respondents' Brief in Opposition.

The attached Exhibit A is a true and correct copy of an affidavit of Christopher Evans, Esq., executed on March 10, 1987. The attached Exhibit B is a true and correct copy of a motion filed by Samuel P. King, Jr., Esq., in the Hawaii Supreme Court on May 9, 1990, which sets forth most of the relevant events in this matter subsequent to April 20, 1990. On May 11, 1990, Mr. King's Motion for Appointment of New Counsel (attached to Exhibit B) was granted and additional counsel was appointed to advise Clarke regarding waiver of the attorney-client privilege.

Clarke has stated, by letter dated May 4, 1990 (attached to Exhibit B), that he does not want any further disclosures of privileged information until he can obtain a second opinion

regarding waiver of the privilege. Petitioner intends to rely upon Clarke's original invocation of the privilege (Exhibit A hereto) and the May 4, 1990, letter, the effect of which will foreclose Petitioner from discussing his trial tactics in the Clarke case. Based on the facts of this case as known to Petitioner, he expects that Clarke will continue to invoke the attorney-client privilege in the future. Therefore, this case is not moot, and Respondent's suggestion of mootness should be stricken from the Brief in Opposition and entirely disregarded by this Court in its consideration of whether to grant Petitioner's Petition for Writ of Certiorari.[1]

DATED: Honolulu, Hawaii, May 14, 1990.

EARLE A. PARTINGTON

EARLE A. PARTINGTON,
Petitioner

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[1]Errata to the petition dated March 22, 1990:

At page 7 at note 6, the last sentence "See note 18." should read "See note 20."

At page 8, the reference to "Supreme Court Rule 17.1(c)" should read "Supreme Court Rule 10.1(c)."

At page 9, the reference to "Rule 17.1(a)" should read "Rule 10.1(a)."

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EARLE A. PARTINGTON, Plaintiff, vs. JOSEPH M. GEDAN and HOWARD T. CHANG, Defendants.	CIVIL NO. 87-0172 AFFIDAVIT OF CHRISTOPHER R. EVANS

AFFIDAVIT OF CHRISTOPHER R. EVANS

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

CHRISTOPHER R. EVANS, being first duly sworn on oath, deposes and says:

1. I am the court-appointed attorney for Clifford M.M. Clarke, Sr., in Cr. No. 59285, in the Circuit Court of the First Circuit, State of Hawaii, now on a second appeal to the Supreme Court of Hawaii following Clarke's second conviction for murder in a retrial resulting from the reversal of his first conviction by the Supreme Court of Hawaii pursuant to a Memorandum Opinion dated December 27, 1985.

2. I replaced Earle A. Partington as Clarke's court-appointed attorney as a result of Mr. Partington's motion to withdraw as counsel because he was then no longer living in Hawaii.

3. I am aware that there is currently pending against Mr. Partington a proceeding brought by the Supreme Court of Hawaii pursuant to Rule 13 of the Hawaii Supreme Court Rules.

EXHIBIT A

4. Clifford M.M. Clarke, Sr., no longer requests a hearing on Circuit Judge Leland Spencer's complaint against Plaintiff as the reversal of his first conviction rendered his request moot.

5. Clifford M.M. Clarke, Sr., has no complaint against Plaintiff for his handling of Clarke's first trial and to the extent his letter requesting a hearing can be construed as a complaint, he withdraws any such complaint. Mr. Clarke is quite satisfied with the representation he received from Plaintiff.

6. On behalf of Clifford M.M. Clarke, Sr., I have instructed Mr. Partington to invoke the attorney/client privilege in this Rule 13 proceeding and any other proceeding because under no circumstances is Clifford M.M. Clarke, prepared to waive the privilege now or in the foreseeable future.

FURTHER AFFIANT SAYETH NAUGHT.

Christopher R. Evans
CHRISTOPHER R. EVANS

Subscribed and sworn to before me
this 11th day of March,
1987.

Donald L. Clarke
Notary Public, State of Hawaii

My commission expires: 5/1/88

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

MOTION TO STAY RULE 13 PROCEEDING

AFFIDAVIT OF SAMUEL P. KING, JR.

EXHIBIT 1

SAMUEL P. KING, JR. 1396

KING & KING, Attorneys-At-Law
Dillingham Transportation Bldg.
Suite 308, 735 Bishop Street
Honolulu, Hawaii 96813
Tel. No. 521-6937

Attorney for Defendant-Appellant

EXHIBIT B

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII,	) Cr. No. 59285
Plaintiff-Appellee,	)
vs.	)
CLIFFORD M. M. CLARKE, SR.,	)
Defendant-Appellant.	)
In re EARLE A. PARTINGTON	)

MOTION TO STAY RULE 13 PROCEEDING

Defendant-Appellant hereby moves, through his attorney SAMUEL P. KING, JR., that this Court stay the Rule 13 proceeding presently being prosecuted against Earle Partington by this Court, until such time as Defendant-Appellant's motion of appointment of new counsel is resolved by Judge Huddy in Circuit Court and Defendant-Appellant has a chance to reconsider the advisability of waiving his attorney-client privilege in the Rule 13 proceeding. This motion is based on the file in this case and the attached affidavit of counsel.

DATED: Honolulu, Hawaii, May 8, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant-Appellant

NO. 10041

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs. CLIFFORD M. M. CLARKE, SR., Defendant-Appellant.	Cr. No. 59285
In re EARLE A. PARTINGTON	

AFFIDAVIT OF SAMUEL P. KING, JR.

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

SAMUEL P. KING, JR., being first duly sworn upon oath, deposes and says:

1. He is personally familiar with the facts stated herein.

2. He is the court-appointed attorney for Defendant-Appellant in Family Court proceedings.

3. Although the Family Court proceeding that Affiant was appointed to represent Defendant-Appellant in was terminated by a court order of the Family Court, the order provides for reopening of the proceeding upon motion of DSSH if and when Defendant is released by the Department of Corrections. As Affiant's affidavit in

Exhibit 1 attached hereto explains, Affiant has made the determination that he has a present and on-going duty to protect Defendant's interests in Family Court, and Affiant is bringing this motion based on his duty to protect Defendant's interests.

4. Affiant has submitted a motion on behalf of Defendant to be heard by Judge Huddy to make a determination as to whether Judge Huddy should appoint new counsel to represent Defendant so that Defendant can obtain a second opinion as to whether he should waive his attorney-client privilege in the Rule 13 proceeding in this case. A copy of the motion submitted to Judge Huddy is attached hereto as Exhibit 1. The motion is presently submitted to Judge Huddy to obtain a hearing date.

5. Affiant believes, as explained fully in his affidavit attached to Exhibit 1, that it is not in Defendant's best interests to waive his attorney-client privilege in this Rule 13 proceeding. Defendant has requested that new counsel be appointed to represent him in his criminal case so that he can obtain a second opinion on the issue of waiver. Defendant is presently uncertain as to whether he should waive his privilege and does not want any further waiver of the privilege

until he obtains his second opinion.

6. Based on the pending motion before Judge Huddy and Defendant's desire not to have any further waiver of his privilege, this Rule 13 proceeding should be stayed until Defendant has had a chance to have full and proper consultation about whether or not he should waive his attorney-client privilege.

7. Based on the facts that Affiant has learned to date, Defendant's April 20, 1990, waiver of the attorney-client privilege was and is completely invalid because Defendant was not fully advised on the effect of the waiver as required by DR 4-101(C)(1). Failure to stay these proceedings until Defendant can be fully advised would be a violation of Defendant's right to counsel and a breach of his right to assert his attorney-client privilege and would very probably hurt him in his future dealings with Family Court and the Parole Board.

Further Affiant sayeth naught.

Samuel P. King

SAMUEL P. KING, JR.

Subscribed and sworn before me on this
8th day of May, 1990.

Victoria A. Chock

Notary Public, State of Hawaii
My commission expires: 10-30-92

SAMUEL P. KING, JR. 1396

KING & KING, Attorneys-At-Law
Dillingham Transportation Bldg.
Suite 308, 735 Bishop Street
Honolulu, Hawaii 96813
Tel. No. 521-6937

Attorney for CLIFFORD CLARKE

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	) Civ. No. 59285
vs.	) MURDER
CLIFFORD CLARKE,	) MOTION FOR APPOINTMENT OF NEW COUNSEL; AFFIDAVIT OF SAMUEL P. KING, JR.; EXHIBIT A; NOTICE OF MOTION
Defendant.	)

MOTION FOR APPOINTMENT OF NEW COUNSEL

Defendant hereby moves, through his Family Court attorney SAMUEL P. KING, JR., for the release of CHRISTOPHER EVANS as his court-appointed counsel, and the appointment of new counsel to represent him in the above-captioned criminal matter. This motion is based on the attached affidavit of counsel, the file in this case and will be further based on the evidence adduced at the hearing on this motion.

DATED: Honolulu, Hawaii, May 8, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE ATTACHED

EXHIBIT 1

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	Civ. No. 59285
vs.	MURDER
CLIFFORD CLARKE,	AFFIDAVIT OF SAMUEL P. KING, JR.
Defendant.	

AFFIDAVIT OF SAMUEL P. KING, JR.

CITY AND COUNTY OF HONOLULU)
) SS.
STATE OF HAWAII)

SAMUEL P. KING, JR., being first duly sworn upon oath, deposes and says:

1. He is personally familiar with the facts stated herein.

2. He is the court-appointed attorney for Defendant in Family Court and represented Defendant regarding Family Court proceedings to which Defendant was a party regarding Ronica Ann Arcala, the victim of the Murder charge in this case, and four of Defendant's own children (the "Clarke minors").

3. More specifically, Defendant was named as a party to the Family Court proceeding which was instituted for the protection of Ronica Ann Arcala in 1982. In 1982, the Family Court was concerned that Ronica's mo-

ther, Debra Arcala, was not taking adequate care of Ronica and may have been abusing her. When the Family Court first instituted its proceeding on behalf of Ronica, Defendant was Debra Arcala's live-in boyfriend and was not a party to the proceeding since Ronica was not Defendant's natural or adopted child. Later in the proceeding, because Defendant was in the Arcala household, Defendant was added as a party to the Family Court proceeding, but he was not suspected of abusing Ronica. When Defendant was joined as a party in the Family Court proceeding, Affiant was appointed to represent him.

4. When Ronica suddenly died, Defendant became a suspect in her death, and the Family Court took jurisdiction over the Clarke minors who were living with Defendant's wife, Sandy. Affiant then represented Defendant as to the Ronica Ann Arcala proceeding and the Clarke minors proceeding.

5. Earle Partington was appointed to represent Defendant at his first criminal trial at which Defendant was convicted. Mr. Partington handled the appeal of that conviction. The Supreme Court of Hawaii reversed the conviction on the basis that Mr. Partington had been intentionally ineffective even though that was not an issue on appeal. Because of that finding by the Supreme

Court, a Rule 13 proceeding was instituted against Mr. Partington.

6. Christopher Evans was appointed to represent Defendant at his second criminal trial at which he was again convicted. Mr. Evans handled Defendant's appeal from the second conviction which was affirmed by the Hawaii Supreme Court.

7. On April 20, 1990, Mr. Evans took a trip to visit Defendant at Kulani Honor Camp where Defendant is presently housed within the correctional system. Mr. Evans took Mark Bennett with him. Mr. Bennett is the person who was recently appointed to prosecuted the Rule 13 proceeding against Mr. Partington. Howard Chang had been prosecuting the Rule 13 proceeding prior to Mr. Bennett's appointment, but Mr. Chang resigned as the prosecutor.

8. In the presence of Mr. Bennett and without knowing what Mr. Partington would say if the attorney-client privilege were waived, Mr. Evans consulted with Defendant as to whether he should wavie his attorney-client privilege with respect to the Rule 13 proceeding against Mr. Partington. Defendant singed a document entitled "Limited Waiver of Lawyer - Client Privilege of Clifford M. M. Clarke, Sr." at that meeting with Mr.

Evans and Mr. Bennett on April 20, 1990. After signing the waiver, Defendant gave a taped statement in which he answered questions of Mr. Bennett about his attorney-client relationship with Mr. Partington.

9. When Affiant heard of Defendant's wavier and the manner in which it was obtained, Affiant became very concerned. First, Affiant did not believe that it was appropriate for Mr. Evans to have consulted about the waiver with Defendant in the presence of Mr. Bennett. Second, Affiant believed that Mr. Evans did not fully advise Defendant on the effect of the waiver because Mr. Evans never found out what Mr. Partington might say about Defendant if the attorney-client privilege were waived. Third, Affiant became most concerned about his own duty toward Defendant with respect to any pending or future Family Court proceedings.

10. Affiant consulted with Disciplinary Counsel on any duty he might have toward Defendant and with Judge Heely, Chief Judge of the Family Court, to check on the status of the previous Family Court proceeding. After these consultations, Affiant determined that he did have a duty at least to advise Defendant of his concerns. Affiant did this by calling Defendant at Kulani last week. Affiant obtained Defendant's permission to talk

to Mr. Partington about what Mr. Partington might say if he were required to discuss his attorney-client communications with Defendant in the Rule 13 proceeding. Affiant then called Mr. Partington and was briefed by Mr. Partington on what he would say. Affiant then called Defendant back and discussed with Defendant the advisability of waiving the attorney-client privilege. Defendant finally asked Affiant to assist him in obtaining a new criminal court-appointed attorney for him so that he could get a second opinion on whehter or not he should waive his attorney-client privilege. A copy of the letter signed by Defendant regarding his request for a new attorney is attached hereto as Exhibit A.

11. Upon advising this Court about Defendant's request today, Affiant was advised that a motion had to be filed to make a determination regarding the advisability of appointing new counsel for Defendant. This motion has been filed so that such a determination can be made.

12. Affiant is making this motion based on his duty to protect, as much as he can, Defendant's interests in pending and potential future Family Court proceedings and because Affiant believes that if Defendant waives his privilege, he can only be harmed by such waiver in Family Court proceedings. Such waiver cannot

help him at all. Also, the waiver may well be adverse to him in criminal proceedings related to this case - e.g. parole hearings, etc.

13. Affiant believes that a hearing on this motion should be set as soon as possible since Mr. Bennett is pressing to require Mr. Partington to give a deposition in the Rule 13 proceeding and now has a motion pending before the Surpeme Court to that effect.

14. The hearing on this motion should be closed to the public and held in camera since it involves matters relating to Defendant's attorney-client privilege, and the only persons who should be entitled to be present during the hearing on this motion, except for appropriate testifying witnesses, should be persons who have an attorney-client privilege with Defendant.

Further Affiant sayeth naught.

SAMUEL P. KING, JR.

Subscribed and sworn before me on this 8th day of May, 1990.

Notary Public, State of Hawaii

My commission expires: 10-30-93

STATE OF HAWAII
DEPARTMENT OF CORRECTIONS

MEMORANDUM

To: Samuel P. King, Jr., Esq. Date: 05/09/90

From: Kulani Correctional Facility Time : 9:00 a.m.

Subject: Signature - Inmate Clifford Clark, Sr.

F A X TRANSMITTAL

Page Total, Including Transmittal Memorandum 2

Instructions/Comments:

Pls. send original for signature and transmittal.

DOC 1005 (3/88)

EXHIBIT A

Samuel P. King Jr. **King & King** Adrienne S. King
Attorneys at Law
Dillingham Transportation Bldg., Suite 309
735 Bishop Street
Honolulu, Hawaii 96813
(808) 521-6067

May 4, 1990

Clifford Clarke
c/o Kulani Correctional Facility
SR 01, Stainback Highway
Hilo, Hawaii 96720

Attn: Dan Unis
Program Section

Dear Clifford:

Pursuant to our phone conversation today in which you indicated you would like to have a new criminal defense attorney appointed to represent you and thereby get a second opinion as to whether you should waive your attorney-client privilege with respect to Earle Partington, I will make your desire known to Judge Huddy. Please sign this letter below and return it to me so that I can give Judge Huddy written confirmation of your desire. Meanwhile, I will advise Judge Huddy that at present you are now uncertain as to whether it is in your best interest to waive your attorney-client privilege and that you do not want any further disclosures of your communications with any attorney, including Earle Partington, until you get a second opinion as to whether you should waive your attorney-client privilege.

Very truly yours,

Samuel P. King, Jr.

APPROVED AS TO FORM AND CONTENTS:

CLIFFORD M. M. CLARKE, SR.
May 4, 1990

SPK:ac

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,	) Civ. No. 59285
	)
vs.	) MURDER
	)
CLIFFORD CLARKE,	) NOTICE OF MOTION
	)
Defendant.	)
	)

NOTICE OF MOTION

TO: Christopher Evans
212 Merchant Street, Suite 300
Honolulu, Hawaii 96813

PLEASE TAKE NOTICE that the attached Motion will be presented before the Honorable WENDELL K. HUDDY in his Chambers in Kaahunamu Hale, Honolulu, Hawaii, on _____, the _____ day of May, 1990, at _____ o'clock ___.m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, May 8, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was delivered to Christopher Evans, counsel for Defendant, on May ____, 1990.

DATED: Honolulu, Hawaii, May ____, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was delivered or mailed to following persons as specified on May 9, 1990:

JOSPEH M. GEDAN
3703 Round Top Drive
Honolulu, Hawaii 96822

MARK BENNETT
McCorriston, Miho & Miller
500 Ala Moana, Suite 400
Honolulu, Hawaii 96813

EARLE A. PARTINGTON
Pacific Tower, Suite 2450
1001 Bishop Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, May 9, 1990.

SAMUEL P. KING, JR.
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was duly served upon the following person(s) on May 14, 1990, to the address below by:

( ) HAND-DELIVER

(X) MAIL

TO: STEVEN S. MICHAELS
Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813

Attorney for Defendants

JOHN ASHFORD THOMPSON
Suite 600
810 Richards Street
Honolulu, Hawaii 96813

Attorney for Amicus Curiae Hawaii
Association of Criminal Defense Lawyers

EARLE A. PARTINGTON